Nos. 15-1302 and 15-2039

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

INTERNATIONAL UNION OF OPERATING ENGINEERS,
LOCAL 150, AFL-CIO,
Intervenor,

v.

SEEDORFF MASONRY, INC.,
Respondent.

CROSS PETITION FOR REVIEW OF AND APPLICATION TO VACATE AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF OF SEEDORFF MASONRY, INC.

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The National Labor Relations Board's ruling that Seedorff failed to prove a one person unit is not supported by the substantial evidence on the record considered as a whole because it ignores the evidence of record and is based instead on an adverse inference drawn in error. The Board's decision also is contrary to Board precedent supporting Seedorff's assignment of the work in question to the bargaining unit represented by the Laborers union rather than the bargaining unit represented by the Operators union. Because the Board's decision is not supported by the substantial evidence of record and is contrary to well-established Board precedent, it must be vacated.

ARGUMENT

I. The Board's Adverse Inference Against Seedorff Was In Error, Is Not Substantial Evidence and Cannot Sustain the Board's Decision.

The Board ruled and now argues on appeal that Seedorff failed to prove that the bargaining unit represented by the International Union of Operating Engineers, Local 150 ("Local 150") was a stable, one person unit. As acknowledged by the Board (JA 7), if an employer employs one or fewer unit employees on a permanent basis, the employer may repudiate a Section 8(f) collective bargaining agreement at any time without violating Section 8(a)(5) of the National Labor Relations Act (the "Act"). *Stack Elec.*, 290 NLRB 575, 577 (1988); *J.W. Peters, Inc. v. Bridge, Structural and Reinforcing Iron Workers,* 398 F.3d 967, 973 (7th Cir. 2005);

Laborers Health & Welfare Trust Fund for N. Cal. v. Westlake Dev., 53 F.3d 979, 983 (9th Cir. 1995). The Board's ruling was based on the adverse inference drawn by the ALJ that because Seedorff did not produce payroll records demonstrating a one person unit, Seedorff failed to carry its burden of proof that it employed one or fewer unit employees in the unit represented by Local 150. (JA 1 n. 1). The adverse inference was drawn in error, is not substantial evidence of record, and does not sustain the Board's decision.

The evidence of record regarding whether there was a stable one person unit is the testimony of Seedorff's President, Bob Marsh, and GC Ex. 5. GC Ex. 5 consists of 12 pages of Seedorff payroll records showing contributions to Local 150 benefit funds on behalf of one Seedorff employee, Jerry Hamlett. (JA 104-105; 234-246). Marsh testified that he reviewed company records and determined that it had employed only Hamlett between 1993 and the present in the bargaining unit represented by Local 150. (JA 104-105). Neither the General Counsel nor Local 150 contradicted Marsh's testimony or offered evidence showing that Seedorff employed more than one employee in the bargaining unit represented by Local 150. Further, GC Ex. 5, the 12 pages of company records showing that Seedorff made contributions to Local 150 benefit funds for only Hamlett, corroborates Marsh's testimony. The fact that the records show contributions during only a three month period in 2009 further corroborates Marsh's testimony

that Seedorff primarily employs members of the Bricklayers and Laborers unions and seldom employs anyone in the bargaining unit represented by Local 150 (JA 97, lines 13-15). The Board subpoenaed and Seedorff produced hundreds of pages of company records to the Board (JA 32, lines 3-15). The Board chose to enter as evidence GC Ex. 5 which supports Marsh's testimony and did not enter any evidence contradicting Marsh's testimony. Because the evidence of record demonstrates that Seedorff employed only one person in the bargaining unit represented by Local 150 at all times relevant to this case, the Board's ruling that Seedorff failed to prove a one person unit is not supported by substantial evidence on the record as a whole and must be vacated.

The ALJ discredited Marsh's testimony because it was not supported "by appropriate documentary evidence." (JA 19, lines 17-18). The ALJ's discrediting of Marsh's testimony is in error because the documents contained in GC Ex. 5 corroborate Marsh's testimony that Seedorff employed only Hamlett in the bargaining unit represented by Local 150. Further, there is no testimony or documentation contradicting Marsh's testimony. The clear preponderance of all the relevant evidence demonstrates that the ALJ's discrediting of Marsh's testimony is in error. *See Standard Dry Wall Products*, 91 NLRB 544 (1950) enf'd 188 F.2d 362 (3rd Cir. 1951); *NLRB v. Stafford*, 206 F.2d 19, 23 (8th Cir. 1953) (An employer's oath cannot be disregarded because of suspicion the employer may be

lying. There must be impeachment of him, substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point.).

The ALJ then compounds the error (and the Board affirms the error) by drawing an adverse inference against Seedorff that because it did not produce payroll records in addition to GC Ex. 5, such other, unspecified records would not be favorable to Seedorff. (JA 19, lines 21-23). The adverse inference rule permits an inference to be drawn that when a party fails to produce evidence within its control, the evidence would be unfavorable to that party. *Rockingham Machine-Lunex Co. v. NLRB,* 665 F.2d 303, 304 (8th Cir. 1981). The missing evidence must be relevant and significant. *JHP & Associates, LLC v. NLRB,* 360 F.3d 904, 910 (8th Cir. 2004). This court has stated that the rule must be applied with caution:

> We adhere to our comment that any rule creating a presumption of this kind is to be applied with caution and we agree with the trial court that "there must be a reason for such a supposition, and a factual area within which it may logically operate. The supposition must rise above the level of mere possibility."

Jenkins v. Bierschenk, 333 F.2d 421, 425 (8th Cir. 1964).

The adverse inference drawn by the ALJ was based on the "mere possibility" that additional payroll records might be unfavorable to Seedorff. There is no evidence supporting the inference. Because Marsh's testimony regarding Seedorff's employment of only one person in the bargaining unit

represented by Local 150 was not contradicted and in fact was corroborated by the 12 pages of payroll documents contained in GC Ex. 5, there was no reason supporting the presumption that additional payroll records from Seedorff would have been unfavorable to Seedorff. There was no evidence that Marsh was untruthful, Seedorff produced hundreds of pages of documents in response to the NLRB subpoena (JA 32, lines 3-15), and the payroll records admitted as GC Ex. 5 corroborated Marsh's testimony. The facts of this case are readily distinguishable from those of *Galesburg Constr.*, 267 NLRB 551 (1983), enforced mem., 703 F. 2d 571 (7th Cir. 1983) in which the employer provided no pay records to support its claims regarding amounts paid to employees and on which jobsite they worked, the vital information in a back pay determination case. Here, the key fact is how many persons were employed by Seedorff in the bargaining unit represented by Local 150. Marsh's uncontradicted testimony and GC Ex. 5 provide substantial evidence that Seedorff employed only one person, Jerry Hamlett, in the bargaining unit. The adverse inference drawn by the ALJ and affirmed by the Board was not reasonable and does not constitute substantial evidence supporting the Board's decision. *See NLRB v. Sunset Minerals, Inc.*, 211 F.2d 224, 226 (9th Cir. 1954).

While Seedorff could have produced records in addition to GC Ex. 5 that would have shown in more detail the pay and hours worked by Hamlett, such records would have been needlessly cumulative to GC Ex. 5, and thus subject to

exclusion from the record under Federal Rule of Evidence 403. GC Ex. 5 showed the hours worked by Hamlett, the time period in which the hours were worked, and the benefit contributions made by Seedorff on behalf of Hamlett. GC Ex. 5 was the subject of thorough questioning by the General Counsel of Marsh on direct examination. (JA 53-61). As stated above, to justify an adverse inference, the missing evidence must be relevant and *significant*. *JHP & Associates, LLC v. NLRB*, 360 F.3d 904, 910 (8th Cir. 2004) (emphasis added). Additional payroll records from Seedorff would have been cumulative of GC Ex. 5 and thus would not be significant. For this reason, the adverse inference against Seedorff was not justified and cannot serve as substantial evidence supporting the Board's decision.

Further, the adverse inference appears to be based on the ALJ's speculation that Seedorff possessed, but did not produce, payroll records that would have shown that Seedorff employed more than one person in the bargaining unit represented by Local 150. However, the ALJ did not identify or describe what additional payroll records she believed would have been unfavorable to Seedorff. *Compare Galesburg Constr.*, 267 NLRB 551 (1983), enforced mem., 703 F. 2d 571 (7th Cir. 1983) (Failure to produce records in back pay dispute regarding wages paid employees specified as reason justifying adverse inference). In fact, other than the payroll records of Jerry Hamlett, Seedorff does not have payroll records that provide direct evidence to prove a one person unit. Seedorff has a multitude

of payroll records, but these records contain information about employees not in the bargaining unit represented by Local 150. Any additional payroll records Seedorff could have produced would have contained information about employees in bargaining units represented by the Laborers union or the Bricklayers union. While substantial in volume and marginally relevant, the records would only show that Seedorff employed several persons who were not in the bargaining unit represented by Local 150. The adverse inference rule does not require that Seedorff produce all evidence possibly relevant to carry its burden of proof. *See Rockingham,* 665 F.2d at 305.

The Board's finding of fact, whether based on an inference or otherwise, must be supported by substantial evidence when viewed on the record as a whole. *Universal Camera Corp. v. NLRB,* 340 U.S. 474, 488 (1951). "The substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Id.* The court may set aside a Board decision when it "cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, *including the body of evidence opposed to the Board's view."* *Id.* (emphasis added). With respect to the ruling that Seedorff failed to prove a single employee unit, the ALJ and the Board completely discounted the uncontradicted testimony of Bob Marsh that was corroborated by GC Ex. 5, and based its ruling on the adverse inference that

because Seedorff did not produce records in addition to those entered as GC Ex. 5, the unproduced records must be considered unfavorable to Seedorff. As set forth in detail above, the adverse inference was made in error. This unjustified adverse inference, particularly when opposed by the uncontradicted testimony of Bob Marsh that was corroborated by GC Ex.5, is not evidence a reasonable mind might accept as adequate to support a finding. *See NLRB v. American Firestop Solutions, Inc.*, 673 F.3d 766, 768 (8th Cir. 2012) (citing *Universal Camera*, 340 U.S. at 477). For this reason, the Board's decision must be vacated.

II. The Board's Conclusion that Seedorff Arranged Nonunit Employees to Perform Bargaining Unit Work as a Way to Convert the Unit into a Single Person Unit is Not Supported by Substantial Evidence and Is Contrary to Board Precedent.

In footnote 1 of the Board's decision, the Board appears to conclude that even if it does not draw an adverse inference against Seedorff, Seedorff failed to prove a one person unit because "nonmembers of Local 150" performed the "same work" as members of the Local 150 bargaining unit. (JA 1 n.1). The Board bases its conclusion on the proposition that if two or more employees perform bargaining unit work, the situation is not converted into a one person unit if the employer arranges for nonunit employees, with a single exception, to perform the work in question. *Id.*

The Board's conclusion is not supported by the substantial evidence on the record and ignores Board precedent regarding proper assignment of work between competing unions. As acknowledged by Local 150, determination of which union's members may properly perform the work in question is crucial to the single person unit analysis. (Intervenor Brief at 37). Local 150 cites *Haas Garage Door Co.*, 308 NLRB 1186 (1992) as the Board authority on the analysis to be followed in determining whether an employer has improperly assigned work to convert a multiple employee bargaining unit to a single person bargaining unit. The facts in *Haas* are very similar to the facts before this Court. In *Haas*, the employer was signatory to a pre-hire Section 8(f) collective bargaining agreement by virtue of its membership in a multi-employer association. *Haas*, 308 NLRB at 1186. The employer assigned the work in question (installation of garage doors) to three persons. Two of the three were independent contractors. The ALJ found and the Board affirmed that the two independent contractors had performed virtually all of the employer's garage door installations for 20 to 30 years which was undisputed bargaining unit work. *Id*. at 1187. While fully taking into account that the employer had assigned undisputed bargaining unit work to independent contractors which resulted in only one employee performing the work in question, the Board held that the single person unit rule applied in the case. *Id.*

Applying the *Haas* analysis to the case before the Court, the substantial evidence on the record shows that for approximately 55 years, Seedorff has properly assigned to members of the Laborers union work that is also claimed by Local 150. Bob Marsh testified extensively about assigning the work in question to members of the Laborers union and his testimony was corroborated by Respondent Exhibits 9 and 11. (JA 94-97, 100, 338, 340). The specific assignment of work by Seedorff to members of the Laborers union is as follows:

> This assignment, which has been historically, traditionally, or contractually assigned to and performed by members of the Laborers' International Union of North America, is to include, but not be limited to, the tending of all masons; unloading, mixing, handling, hoisting and conveying of all materials used by masons by any mode or method: the loading, unloading, erecting, dismantling, moving and adjusting of all scaffolds, the starting, stopping, fueling, oiling, cleaning, operating and maintenance of all mixers, mortar pumps and other devices under the direction Seedorff Masonry, Inc., or their representative, to Laborers Local #538. This assignment specifically includes the operation and maintenance associated with rough terrain forklifts used in the loading, stocking or transporting of material and equipment.
>
> This assignment is being made in accordance with Seedorff Masonry, Inc.'s policies; safe construction procedures, industry practice and efficient work practices.

Respondent Ex. 9. (JA 338).

The assignment of the above work to members of the Laborers union rather than to members of the Operators union has been consistently ruled to be appropriate by the Board. *See Laborers Local 310 (KMU Trucking),* 361 NLRB

No. 37 (Sept. 3, 2014); *Laborers' Local 894 (Donley's, Inc.)*, 360 NLRB No. 20 (Jan. 10, 2014); *Operating Engineers Local 18 (Donley's, Inc.)*, 360 NLRB No. 113 (May 15, 2014); *Laborers Local 860 (Ronyak Paving, Inc.)*, 360 NLRB No. 40 (Feb. 12, 2014); *Laborers Local 265 (AMS Construction)*, 356 NLRB No. 57 (Dec. 28, 2010). The General Counsel and Local 150 provided no evidence disputing that Seedorff's assignment of the work in question to members of the Laborers union was not appropriate.

Applying the Board's analysis in *Haas* to the case now before the Court, the substantial evidence on the record demonstrates that Seedorff's assignment of the work in question to members of the Laborers union for the last 55 years is not an arrangement intended to convert a multiple employee bargaining unit into a single employee bargaining unit. Just as in *Haas*, Seedorff properly assigned the work in question to non Local 150 bargaining unit members for a long period of time. At all material times, Seedorff employed only one person, Jerry Hamlett, in the Local 150 bargaining unit. The substantial evidence shows that the Local 150 bargaining unit at Seedorff has never been more than a single employee unit. (JA 97; 104-105; 110; 121; 234-246, 338). The ALJ's conclusion and the Board's agreement that the Local 150 bargaining unit at Seedorff consisted of multiple employees and that work assigned by Seedorff to members of the Laborers union was work reserved for Local 150 members under the Quad City Builders Association

collective bargaining agreement has no factual basis and is contrary to Board precedent. As stated by the Board in *Haas*, "Here, we find that there is no evidence that the Respondent has had more than one employee performing unit work at all material times, and thus we find the one-man unit rule applies in this case." *Haas*, 308 NLRB at 1187. For these reasons, the Board's conclusion that Seedorff arranged nonunit employees to perform bargaining unit work as a way to convert the Local 150 bargaining unit to a single person unit must be vacated.

CONCLUSION

The Board's decision is not supported by substantial evidence on the record and is inconsistent with Board precedent. The Board improperly drew an adverse inference against Seedorff and based its decision on this adverse inference while ignoring the uncontradicted and unimpeached testimony of Bob Marsh, which testimony was also corroborated by GC Ex. 5. Further, the Board's conclusion that Seedorff assigned work to convert a multi-employee Local 150 bargaining unit into a single person unit is not supported by substantial evidence on the record and is inconsistent with Board precedent. For these reasons, Seedorff requests that the Court set aside the Board's findings and conclusions of law and vacate its Order.

Dated: May 28, 2015

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/s/ Kelly R. Baier
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/s/ Kelly R. Baier
Attorney for Respondent

Dated: May 28, 2015

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I hereby certify that on May 28, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system.

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/s/ Peggy M. Kuennen